On April 1, 2015, Kentucky Governor Steve Beshear signed into law House Bill 440, which includes several significant additions and changes to Kentucky's business entity laws. The 2015 Legislation will become effective on June 24, 2015 (90 days after the closing of the 2015 General Assembly session on March 25, 2015)

1. Adoption of the Revised Uniform Unincorporated Nonprofit Association Act

The changes to KRS Chapter 273 (the Kentucky’s nonprofit corporation laws) and addition of KRS Chapter 273A, Kentucky’s Uniform Unincorporated Nonprofit Association Act, are said in press reporting to be the result of recommendations made by Kentucky's Secretary of State, Alison Lundergan Grimes, in cooperation with the Kentucky Nonprofit Network and Grimes's Nonprofit Task Force.

The Governor's press release had this to say about House Bill 440:

"[House Bill 440] brings Kentucky law in line with more than 15 other states by updating rules for informal nonprofit entities such as Little League teams and local fundraising efforts. The bill allows these nonprofits to make a filing with the Secretary of State, affording participants limited liability from debts and obligations of the organization.

House Bill 440 will also bring much-needed updates to the state’s nonprofit corporation laws, accounting for advances in technology and spelling out how nonprofits can utilize technology such as email and conference calling.

"Life is better in Kentucky because of nonprofits - thousands of agencies and organizations that perform myriad vital functions, from raising money for those in need to creating recreation for our children," said Gov. Beshear. "This bill simplifies requirements for those organizations, allowing them to focus more on their volunteer work than their paperwork."
"There are more than 27,000 nonprofit entities registered to do business in Kentucky, and they benefit our communities in a variety of important ways, from creating important jobs, to combating hunger, to assisting individuals with disabilities, to supporting our youth, to promoting the arts," said Grimes. "House Bill 440 will help them continue to serve our communities by simplifying and improving the laws that govern them, and I'm proud that our efforts to pass this legislation have paid off."

Most of the new legislation relates to the adoption of many of the provisions found in the Revised Uniform Unincorporated Nonprofit Association Act (RUUNAA) published by the National Conference of Commissioners on Uniform State Laws. Persons interested in learning more about the model act should study the prefatory note and annotations to the RUUNAA published by the National Conference of Commissioners.

As noted in the RUUNAA prefatory note:

An unincorporated nonprofit association (UNA) is a nonprofit organization that is not a charitable trust or a nonprofit corporation or any other type of association organized under statutory law that is authorized to engage in nonprofit equivalent of a general partnership, which is the default for profit organization.

RUUNAA deals with the following basic issues: (1) definition of the types of organizations covered; (2) the relation of the act to other existing laws; (3) the recognition that a UNA is a legal entity and the legal implications flowing from this status, including the ability of a UNA to own and dispose of property and to sue and be sued in its own name; (4) the contract and tort liability of a UNA and its members and managers; (5) internal governance, fiduciary duties, and agency authority; and (6) dissolution and merger.

RUUNAA was drafted with small informal associations in mind. These informal organizations are likely to have no legal advice and so fail to consider legal and organizational questions, including whether to incorporate. The act provides better answers than the common law for a limited number of legal problems. Its answers are more in accord with the expectations of those participating in the work of a UNA and third parties dealing with a UNA than the common law.

A new KRS Chapter 273A has been added to Kentucky's business entity laws, modeled on provisions from the RUUNAA, and which will be cited as the Kentucky Uniform Unincorporated Nonprofit Association Act (KUUNAA).

Prior to the adoption of the KUUNAA, the status of informal nonprofit associations in Kentucky from a business entity standpoint was unclear - depending on the facts, they might fall into the category of a general partnership under certain circumstances or have some other common law association status. These informal associations were not governed by KRS Chapter 273 because they are not organized as nonprofit corporations and were not governed by the nonprofit provisions of the Kentucky Limited Liability Company Act because they are not organized as LLCs. The fact that these unincorporated entities were not covered by any business entity statutes meant that they did not have the benefit of the liability shielding provisions of those statutes,
which concerned the drafters of the RUUNAA and the KUUNAA.

Associations falling within the scope of the KUUNAA ("Associations") are defined to be unincorporated organizations consisting of two or more members joined under an agreement that is oral, in a record (which is referred to in the annotations to the model act to encompass a writing, including an electronic writing such as an email), or implied from conduct, for one or more common, nonprofit purposes. Entities incorporated or organized under other business entity statutes are excluded from the scope of KUUNAA, as are marriages, domestic partnerships, joint tenancies, tenancies in common or tenancies by the entirety, even if the owners hold property for nonprofit purposes. Associations and organizations that specifically provide in a record that the relationship does not create an unincorporated nonprofit organization are also excluded from the scope of the KUUNAA. The definition and scope of "nonprofit purposes" follows typical definition for a nonprofit organization found in statutes such as Kentucky's nonprofit corporation statutes (KRS Chapter 273). Associations that fall within the scope of the KUUNAA may, but are not required to, file a certificate of association, and if they do, they must have a registered office and agent and must file annual reports.

Under the KUUNAA, an Association is recognized as a legal entity separate from its members and may acquire and hold interests in property. **If (and only if) the Association files a certificate of association with the Kentucky Secretary of State**, Association members have a shield against debts, obligations and other liabilities of the Association which is similar to an LLC member's liability shield. As is the case with other business entities, members will not be protected from liability arising out of their own negligence, wrongful acts, or misconduct. A member of an Association is not a proper party to a proceeding to enforce that claim solely by reason of being a member or manager if the Association filed its statement of association prior to the date the claim accrued. Judgment creditors of an Association are generally prohibited from levying execution against a member's assets to satisfy the claim against the Association. A questionable exception to this general rule is where the Association is a debtor in bankruptcy. As a side note, it is unclear whether the drafters of the KUUNAA intended the scope of the governance and liability provisions to cover only those entities who have filed a statement of association, or all entities falling within the scope of an "association" under the KUUNAA.

The KUUNAA sets forth general governing requirements for Associations. These requirements largely mirror those of LLCs, including the concept of "members" and "managers", and the limited agency authority accorded to non-manager members. The KUUNAA provides that unless the governing principles of the corporation (sic) provides otherwise, approval of a matter by members requires an affirmative majority of the votes cast at a meeting of members.

The KUUNAA suggests that an Association may have "governing principles", which may be written, oral or implied from established practices, that govern the purpose or operation of the Association and the rights and obligations of its members and manager. Presumably, these governing principles are similar in concept to corporate bylaws or an LLC's operating agreement. Some KUUNAA provisions dealing with association governance specifically contemplate the members' right to alter the default provisions of the KUUNAA through governance principles. Presumably, many provisions that do not expressly state that they may be trumped by governance principles can, in fact, be altered by written agreement of the Association's members.
For example, Association members could agree in a written document that they have a fiduciary duty to the Association and other members, in spite of the statute being silent on the right to alter the default clause.

Association members do not owe fiduciary duties to the Association solely by virtue of being a member, but must discharge their duties to the Association and other members consistent with good faith and fair dealing. A manager of an Association has a duty of loyalty and care with respect to the Association, and must manage the Association in good faith, in a manner the manager honestly believes to be in the best interest of the Association, and with such care, including reasonable inquiry, as a prudent person would reasonably exercise in a similar position and under similar circumstances. As with other organizations, conflicts of interest may be ratified by the Association, and managers are subject to the business judgment rule. The governing principles of an Association, if found in a record, may limit or eliminate manager liability, except for amounts of improperly received financial benefits, intentional infliction of harm, intentional violation of the law, breach of the duty of loyalty, or improper distributions. Association members have a right to reimbursement of expenses and indemnification similar to the LLC member counterparts.

An Association may not pay dividends or make distributions to a member or manager, but may pay reasonable compensation or reimbursements, confer benefits on a member or manager in conformity with non-profit purposes, repurchase a membership and repay a capital contribution, or make distributions of property to members upon winding up and termination. Associations may also indemnify those acting on behalf of the Association if not for an action for which liability may not be limited. The KUUNAA also has additional provisions addressing Association governance issues.

Under KRS 365.015, the real name of an Association is the name set forth in the certificate of association, or if none, the name under which the association generally acts. The real name of a foreign association is the name it is recognized as in the jurisdiction of organization. The real name of an Association must now end with "Limited" or "Ltd." If the association has not made a filing with the Kentucky Secretary of State, the KUUNAA prohibits the use of "Limited," "Ltd.," "incorporated," "corporation," "Inc.," "Corp.," "company," "partnership," or "cooperative." No Association may transact business under an assumed name without first filing a certificate of assumed name.

2. Amendments to the Kentucky Business Corporation Act (KRS Chapter 271B)

KRS 271B.1-400 has been amended to clarify the appropriate jurisdiction and venue for certain claims against the corporation. The "appropriate court" is defined in a new paragraph as the Circuit Court for the county within the Commonwealth in which the corporation maintains its principal office or, if none, the county in which the registered office is located. The statute is also amended to provide that a corporation's articles of incorporation may limit the proper venue for a derivative action or an action to compel the production of books and records to the "appropriate court".
KRS 271B.8-510 has been amended to change the requirements an individual must meet in order to be eligible for indemnification by the corporation. Going forward, a director must "honestly", as opposed to "reasonably", believe the conduct was in the corporation’s best interest if performed in his or her official capacity, and in all other cases, must honestly believe the conduct was at least not opposed to its best interests.

KRS 271B.11-050 has been amended to modify the filing requirements for corporations who are parties to mergers or share exchanges. Under amended KRS 271B.11-050, the surviving or acquiring corporation must file articles of merger or share exchange with the Secretary of State that set forth the names of the parties, the name of the surviving or acquiring corporation, the information required by KRS 271B.11-010(2)(c) (if the transaction is a merger) and any amendments to the articles of incorporation of the surviving corporation, and the information required by KRS 271B.11-020(c) (if the transaction is a share exchange). Previously, articles of merger were required to set forth the plan of merger. There is little substantive difference between the old and new requirements, other than perhaps the ability to exclude additional information that might have previously been included in a "plan of merger" from the filing.

KRS 271B.13-020 has been amended to modify the rights of corporate dissenters. Under amended KRS 271B.13-020, a shareholder entitled to dissent and obtain payment may not challenge the corporate action creating his or her entitlement except by application for injunctive relief prior to the consummation of the corporate action. Previously, a dissenter could challenge the action if it was unlawful or fraudulent with respect to the shareholder. Although it remains to be seen how courts will interpret and apply this provision, it appears that the change is an attempt force minority shareholders to make any claims that a merger transaction is unlawful or fraudulent in connection with seeking a pre-merger injunction, rather than leaving open the door to challenge dissenter’s rights as the sole post-merger remedy on the grounds that the merger was unlawful or fraudulent.

3. Amendments to the Kentucky Limited Liability Company Act (KRS Chapter 275)

KRS 275.015 has been amended to clarify that a nonprofit limited liability company may have one or more, or no, members. In the event the nonprofit LLC has no members, the dissolution provision of KRS 275.285(4) will not be triggered. Another amendment provides that both a nonprofit Kentucky corporation and a foreign nonprofit corporation may convert into a nonprofit LLC. However, conversion into a nonprofit LLC is permitted allowed when all of the LLC’s members are 501(c)(3) or 501(c)(4) organizations under the Internal Revenue Code. The articles of organization required to be filed to effect the conversion must contain a statement affirming the membership requirement is met.

Unless a nonprofit LLC has only nonprofit business entities as its member, a nonprofit LLC may not have or issue membership interests in the LLC, and no distribution shall be paid or income or profit of the LLC shall be distributed to its members or managers. A nonprofit LLC may also only make loans to its members or managers if the members of the nonprofit LLC are nonprofit business entities. Any member or manager who assents to or participates in the loan, if disallowed, will be liable to the LLC for the amount of the loan until its repayment. KRS 275.165 was amended to prohibit remuneration to members and managers for services
performed for the LLC except as provided in a written operating agreement.

KRS 275.335 has been amended to provide that in determining whether a majority of managers or members entitled to vote has approved the bringing of a derivative action on an LLC’s behalf, the vote of any member or manager who has an interest in the outcome of a derivative suit that is adverse to the interest of the LLC is excluded from consideration unless otherwise provided in a written operating agreement.

KRS 275.165 has been amended to provide that a member or manager will not be entitled to remuneration for services performed for his LLC unless as agreed upon in a written operating agreement. Presumably, this doesn't impact the ability of the LLC and a member or manager to enter into a separate agreement (which might be considered in that instance to be a part of the LLC's "operating agreement") compensating the member or manager for services.

KRS 275.175 has been amended to add to the list of matters requiring member vote the following actions: merge or convert the LLC or approve a sale of substantially all of its assets; admit a new member, including as assignee of a member, as a member; remove a member after assignment of the member's entire membership interest; waive an agreement to contribute to the LLC, approve voluntary dissolution; approve any acting contravention of a written operating agreement; or allow the voluntary resignation of a member from a manager-managed LLC. Any of these actions requiring member approval under KRS 275.175 can be modified or deleted in a written operating agreement.

4. Amendments to the Kentucky Nonprofit Corporation Act (KRS Chapter 273)

A new section has been added to the Kentucky Nonprofit Corporation Act dealing with notice requirements, including clause providing that notice shall be in writing unless oral notice is reasonable under the circumstances and that notice by electronic transmission is written notice.

Another new section provides that unless the articles of incorporation or bylaws provide otherwise, any action required or permitted to be taken under the under KRS Chapter 273 may be taken without a meeting if the action is taken by all members of the board. The signed, written consent of each director must be included in the minutes or filed in the corporate records if such action is taken. The action will become effective when the last director signs the consent. KRS 273.377 was amended to allow members of corporation to take the actions without a meeting if a written consent is signed by all of the members entitled to vote. The consent must be delivered to the corporation for recording in the minutes or other records, and any action taken will be effective when the signed consents are delivered to the corporation. A member may revoke his or her consent by written notice if delivered to the corporation before the remainder of the consents are delivered to the corporation.

Under amended KRS 273.161, delivery now includes electronic transmissions, and electronic signatures are now considered valid signatures. KRS 273.217 was amended to permit the board of directors to allow any or all of the directors to participate in or conduct a meeting by any means of communication by which all directors can simultaneously hear each other. This would allow directors to take advantage of teleconferencing and newer
services such as Skype. However, while the amendments to KRS Chapter 273 broadened the ability of directors to participate in meetings, it also prohibits proxy voting by directors.

Other changes include eliminating the written notice requirement for meetings, unless otherwise required in the articles or bylaws, and setting a two day notice requirement for meetings when the bylaws are silent. KRS 273.313 has been amended to provide that articles of dissolution may be delivered at any time after dissolution is authorized and proceedings have not been revoked. Articles of dissolution must now contain the name of the corporation, the number of votes entitled to be cast on the proposal to dissolve, either the total number of votes cast or the total number of undisputed votes cast for dissolution and a statement that the number was sufficient for approval, and if group voting was required the above information for each group entitled to vote separately if there are members entitled to vote on the dissolution, if there are no members or no members entitled to vote a statement of such fact, the date of the meeting of the board at which the resolution was adopted, and a statement of the fact that the dissolution received a majority vote, and a copy of the plan of distribution as adopted by the corporation. The corporation will be dissolved as of the effective date of its articles of dissolution. A new section of KRS Chapter 273 has been added which sets forth the activities a dissolved corporation may engage in while winding up the business.

KRS 273.227 was amended to note that every officer of a corporation, by accepting an election or appointment as an officer, is deemed to have consented to jurisdiction in Kentucky. Previously the statute deemed an officer to have consented only when he or she accepted a position as a director.

5. General and Limited Partnerships (KRS Chapter 362)

A general partnership and a limited partnership may sue or be sued in its real name. A judgment against a limited partnership binds the limited partnership as a legal entity, but does not bind a general partner in his or her individual capacity unless permitted by statute and when the partner has been named in the action. With regards to limited partnerships, KRS 362.2-801 has been amended to limit the instances when the same person is both the only general partner and the only limited partner. KRS 362.2-935 has been amended to provide that when a derivative action involving a limited partnership is terminated, a court may now require the plaintiff to pay the defendant's reasonable expenses, including attorney's fees.

6. Miscellaneous Amendments

Electronic Filing: KRS 14.105 has been updated to expand the number of entities that may use electronic filing with the office of the Kentucky Secretary of State. These include statutory trusts under KRS Chapter 386A and unincorporated nonprofit associations. The Amendment also allows the Secretary of State to file redacted records when the law prohibits the Secretary from disclosing the information in the record.

Foreign Insurers: KRS 14A.9-010 has been amended to provide that foreign insurers with a certificate of authority from the commissioner of the Department of Insurance are not required to obtain a certificate of authority from the Secretary to transact business in Kentucky or be eligible for the award of a state contract.
2015 Amendments and Additions to Kentucky's Business Entity Laws

**Kentucky Uniform Statutory Trust Act:** KRS 386A.1-030, a provision included in the Kentucky Uniform Statutory Trust Act, was amended to note that the trust instrument is allowed to provide that the statutory trust is to act as a beneficial owner associated with a series thereof or provide that each beneficial owner shall be the owner of an undivided beneficial interest in all property of the statutory trust in addition to an undivided beneficial interest in all property of or associated with a series of the statutory trust with which the beneficial owner is associated. The governing instrument may also provide for the means by which a beneficial owner is associated with a series. The excess rate of interest defense prohibition of KRS 360.027 was also amended to apply to "statutory" trusts in addition to "business" trusts.

**Uniform Electronic Transactions Act (KRS Chapter 369):** Statutory trusts, limited partnerships, and limited cooperative associations were added to the definition of "person" under the Uniform Electronic Transactions Act.

**Banks and Trust Companies:** KRS 286.3-065, which details the duties of directors, was amended. This statute now will apply to both officer and directors. Each officer and director will be required to discharge duties in good faith with ordinary care and diligence. No officer or director will be personally liable to the bank or any other person for monetary damages for any action taken or failure to act in their official capacity, unless the conduct was gross negligence, willful or reckless misconduct, a knowing violation of the law, or if the damages arise from a transaction where the officer or director received an improper personal benefit. An officer or director will not be considered to be acting in good faith if he or she has knowledge concerning the matter that makes reliance on the reports of others unreasonable. A plaintiff seeking monetary damages must show that the officer or director has breached a duty by clear and convincing evidence and that the breach was the cause of the damages. The liability of an officer or director for any act or omission occurring prior to June 23, 2015 is not affected by this amendment to KRS 286.3-065.